

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

No. 74-1684 & No. 74-2018

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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In the Matter of
THE LEHIGH and HUDSON RIVER RAILWAY
COMPANY,

Debtor.

COMMONWEALTH OF PENNSYLVANIA,

Appellant.

BRIEF FOR APPELLANT
AND APPENDIX

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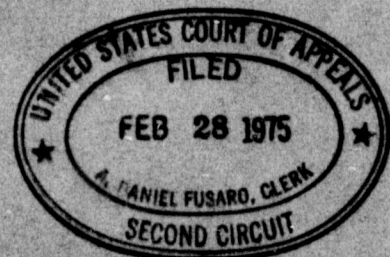
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JANUARY 1975



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Preliminary Statement

These are two appeals from two decisions rendered by Hon. Robert J. Ward, in the United States District Court for the Southern District of New York, sitting as a railroad reorganization court under section 77 of the Bankruptcy Act. 11 U.S.C. 205.

The first decision is reported at 374 F. Supp. 4, and is reproduced herein. (App., 1a-5a).

The second decision is reported at 377 F. Supp. 475, and is reproduced herein. (App., 6a-7a).

ISSUES PRESENTED

1. Whether the findings required to be made by a railroad reorganization court under section 207(b) are contrary to the separation of powers of the U.S. Constitution, so that the reorganization court lacks jurisdiction.
2. Whether the decision of the Special Court is binding as to the jurisdictional issues of this appeal.

STATEMENT

These are two appeals taken by Commonwealth of Pennsylvania from decisions by the reorganization court for the Lehigh and Hudson River Railway Company. The orders were entered under section 207(b) of Regional Rail Reorganization Act of 1973, 45 U.S.C. 717(b).

The order under the first sentence of section 207(b) was entered April 24, 1974. (App., 1a-5a). The court ruled adversely to our jurisdictional contentions, but noted that it was being raised in other forums. 374 F. Supp. at 6: (App., 3a):

"Since this argument is being raised in other forums and an appeal is contemplated, the parties have stipulated that it not be argued or decided here, without prejudice to its being raised at a later time."

Similar appeals have been taken to the U.S. Court of Appeals from the actions of the reorganization courts for the Penn Central Transportation Company, Lehigh Valley Railroad Company, Reading Company, and The Central Railroad Company of

New Jersey. (Nos. 74-1501, 74-1556, 74-1557, 74-1558, and 74-1589). These cases were argued July 18, 1974 in the Third Circuit.

The second order, entered under the second and third sentences of section 207(b), was made July 1, 1974. (App., 6a-7a). 377 F. Supp. 475.

Similar appeals have been taken to the U.S. Court of Appeals from the actions of the same reorganization courts. (Nos. 64-1649, 74-1686, 74-1687, 74-1688 and 74-1689) The cases are pending in the Third Circuit.

ARGUMENT

Attached hereto are our briefs filed in the U.S. Court of Appeals for the Third Circuit in these related appeals. We shall lodge 4 copies of the brief of the New Haven Trustee, referred to in our brief of June, 1974. We no longer press our jurisdictional contention regarding the Class II character of the Lehigh & New England Railway Company. (App., 3a). Accordingly, the issues here are now identical with those in the Third Circuit.

We have no objection to transfer of these appeals to the U.S. Court of Appeals for the Third Circuit.

CONCLUSION

The court should reverse and set aside the "120-day" and "180-day" orders of the reorganization court for the Lehigh and Hudson River Railway Company.

Respectfully submitted,

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JANUARY 1975

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In the Matter of READING COMPANY,	:	
Debtor	:	No. 74-1556
COMMONWEALTH OF PENNSYLVANIA,	:	
Appellant.	:	
In the Matter of LEHIGH VALLEY RAILROAD COMPANY,	:	
Debtor	:	No. 74-1557
COMMONWEALTH OF PENNSYLVANIA,	:	
Appellant.	:	
In the Matter of THE CENTRAL R.R. COMPANY OF N.J.,	:	
Debtor	:	No. 74-1558
COMMONWEALTH OF PENNSYLVANIA,	:	
Appellant.	:	
In the Matter of PENN CENTRAL TRANSPORTATION CO.,	:	
Debtor	:	No. 74-1589
COMMONWEALTH OF PENNSYLVANIA,	:	
Appellant.	:	

BRIEF FOR APPELLANT

Jurisdictional Statement

These appeals are taken pursuant to section 24 of the Bankruptcy Act, 11 U.S.C. 47. The subject-matter jurisdiction of the court is conferred by section 77 of the Bankruptcy Act, among other statutes. 11 U.S.C. 205.

ISSUE PRESENTED

Whether the findings required to be made by the railroad reorganization court under section 207(b) are contrary to the separation of powers of the U.S. Constitution, so that the reorganization court lacks jurisdiction.

STATEMENT

These are four appeals, taken by Commonwealth of Pennsylvania, from each of four orders entered on or about May 2, 1974, by four railroad reorganization courts situated within the Third Circuit.

Section 207(b) of Regional Rail Reorganization Act of 1973, 45 U.S.C. 717(b),^{1/} specifies that --

"Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act."

The reorganization court for Penn Central Transportation Company^{2/} by Memorandum and Order No. 1543, entered May 2, 1974,

^{1/} P.L. 93-236, enacted January 2, 1974.

^{2/} Each of the four railroads involved in these appeals is undergoing reorganization pursuant to section 77 of the Bankruptcy Act. 11 U.S.C. 205.

determined that Penn Central" is not reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act, within the meaning of section 207(b) of Regional Rail Reorganization Act of 1973." (App., 20a). The court did not make the "public interest" finding set forth in the second portion of the first sentence of section 207(b). The court reasoned (App., 4a):

"Unless there is a finding that the Debtor is reorganizable under section 77, there is no necessity for making a public interest comparison under section 207(b). Since I have reached the conclusion that the Debtor is not reorganizable, there is no present necessity for resolving the second phase of the jurisdictional argument."

Memorandum and Order No. 1543 have been appealed by the New Haven Trustee^{3/} and by Commonwealth of Pennsylvania.^{4/ *}

The reorganization court for Reading Company by Memorandum and Order No. 607 found that Reading is "not reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act, and therefore no decision need be made as to whether the public interest would be better served by reorganization under section 77 than by reorganization under the Regional Rail Reorganization Act of 1973." (App., 73a). The court's order was entered May 2, 1974, and referred to the opinion of the Penn Central reorganization court on this issue. (App., 67a).^{5/}

The reorganization court for Lehigh Valley Railroad Company

^{3/} No. 74-1501 (USCA-3rd Cir.). Consolidated with these appeals.

^{4/} No. 74-1589 (USCA-3rd Cir.). On appeal here.

^{5/} On appeal here in No. 74-1556. (USCA-3rd Cir.)

^{*} The opinion incorrectly states³ that we expressed the view that the railroad is not reorganizable on an income basis within a reasonable time under section 77. (App., 19a).

on May 2, 1974 entered Memorandum and Order No. 245, finding that Lehigh Valley is not reorganizable on an income basis within a reasonable time under section 77. The form of the order is identical with that in the Penn Central proceeding. (App., 58a).^{6/} The Lehigh Valley court incorporated the jurisdictional discussion of the Penn Central memorandum by reference. (App., 42a).

The reorganization court for The Central Railroad Company of New Jersey on April 30, 1974 entered Memorandum and Order No. 661. The court found that the railroad "is not reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act, and that such finding makes it unnecessary to now decide whether the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under the Regional Rail Reorganization Act of 1973."^{7/} (App., 81a). The court declined to make a "public interest" determination (App., 81a):

"Under the wording of Section 207(b), a finding that the public interest would be better served by continuing the present reorganization proceeding than by a reorganization under the Act is naturally and logically dependent on the Court first finding that the Debtor can be reorganized on an income basis within a reasonable time under section 77 of the Bankruptcy Act. Absent such a finding, there could be no purpose in continuing with proceedings for a reorganization under section 77 of the Bankruptcy Act. Since the Court has already made a finding that the Debtor is not reorganizable on an income basis within a reasonable time, there is no need for a finding as to whether the public interest would be better served by continuing the present reorganization proceeding than by a reorganization under the Act."

6/ On appeal here in No. 74-1557 (USCA-3rd).

7/ On appeal here in No. 74-1558 (USCA-3rd).

The four appeals taken by Commonwealth of Pennsylvania from the section 207(b)-first sentence decisions in the Penn Central, Reading, Lehigh Valley, and Jersey Central proceedings, are being briefed concurrently with the appeal taken by the New Haven Trustee in the Penn Central proceeding.

Commonwealth of Pennsylvania and New Haven Trustee appealed the May 2, 1974 decisions^{8/} to the Special Court established under section 209 of the new law, 45 U.S.C. 719. The Special Court on May 24, 1974 dismissed the appeals for lack of jurisdiction.

Interest of Pennsylvania

Commonwealth of Pennsylvania is a creditor of the various railroads. It also appears in a role of protector of the public interest of the citizens and businesses of Pennsylvania with respect to adequate rail transportation. By its Attorney General, Pennsylvania is a general intervenor in each of the reorganization proceedings. The Commonwealth is also a shipper/receiver of freight, and has financial commitments regarding passenger train service in the Philadelphia commuter area.

Scope of these Appeals

The appeals taken by Commonwealth of Pennsylvania to this Court concern the jurisdiction of the reorganization courts to render decisions under section 207(b).^{9/}

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- ^{8/} Commonwealth of Pennsylvania did not appeal the Penn Central determination to the Special Court. Also involved in the Special Court proceeding was the decision of the reorganization court for Lehigh & Hudson River Railway Company (72 B 419, USDC-SDNY).
- ^{9/} Assuming arguendo, that jurisdiction does exist, we believe that appeals on the merits under section 207(b) would more appropriately be considered in conjunction with the "180-day" orders. Similarly, whether section 207(b) offends due process in any given proceeding in our view would be decided in conjunction with the "180-day" decision.

ARGUMENT

I. THIS COURT HAS APPELLATE JURISDICTION OVER SECTION 207(b) DETERMINATIONS BY RAILROAD REORGANIZATION COURTS.

We concur in that portion of the brief filed by the New Haven Trustee in No. 74-1501, which deals with the jurisdiction of this Court to hear the appeal, and incorporate the same by reference. (N.H.T. Br., pp. 17-33).

We add that determinations under section 207(b) ought to ultimately be reviewable by the U.S. Supreme Court. The best construction would be that the fifth, sixth, and seventh sentences of section 207(b) be held void, resulting in the ordinary method of review being continued as with regular orders of the reorganization court. It would be awkward for Commonwealth of Pennsylvania to attempt to invoke the Supreme Court's original jurisdiction. Washington v. General Motors Corp., 406 U.S. 109 (1972); Chio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971). See also: 28 U.S.C. 1251.

II. THE ORDERS ARE UNCONSTITUTIONAL AS A DELEGATION OF LEGISLATIVE POWERS TO THE COURT CONTRARY TO SEPARATION OF POWERS

The first sentence of section 207(b) requires that the reorganization court, an Article III court, determine whether the railroad is reorganizable on an income basis within a reasonable time under section 77 and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under Regional Rail Reorganization Act of 1973.

However, the Penn Central, Lehigh Valley, Reading, and Jersey Central reorganization courts declined to answer the "public interest" question. The stated basis was that a negative response to the "reorganizability" portion of the first first sentence of section 207(b) removed any requirement to respond to the "public interest" question. (App., 4a, 42a, 67a, 73a, 81a). See also: Secondary Debtor opinion. (App., 29a-32a).

1. SECTION 207(b) REQUIRES PUBLIC INTEREST FINDINGS.

The statute contemplates that a reorganization court will make "public interest" findings under section 207(b).

A. The Invalid Comparison. Judge Fullam stated in the Penn Central proceeding^{10/} that "unless the debtor is reorganizable under section 77", there is no necessity for a public interest comparison under section 207(b). (App., 4a) Judge Augelli came to the same conclusion, but added that "there could be no purpose in continuing with proceedings for reorganization under section 77", absent a finding that the debtor can be reorganized on an income basis within a reasonable time under section 77. (App., 81a).

The reorganization courts erroneously have treated a finding under the first sentence of section 207(b), that a railroad "is not reorganizable on an income basis within a reasonable time under section 77", as the equivalent of a finding that the debtor is not reorganizable at all under section 77, so that the second portion of the first sentence is superfluous, and that the section 77 proceeding otherwise would be dismissed.

^{10/} Adopted in the Reading and Lehigh Valley opinions.

There is no basis for such a comparison. Dismissal of a section 77 proceeding is controlled by section 77(g), which requires a finding of "undue delay" and consultation with the Interstate Commerce Commission. Moreover, the words "income basis", "reasonable time", and "railroad", which appear in section 207(b), are clearly not the same as govern the dismissal of a section 77 proceeding. (App., 4a-5a, 36a).^{*/}

As nearly as can be determined, the phrase "reorganizable on an income basis within a reasonable time under section 77" would seem derived from the language of In Re Third Avenue Transit Corp., 198 F. 2d 703, 706 (2d Cir. 1952), "That the debtor can be reorganized in accordance with the Act, within a reasonable time." Footnote 10 adds, "This means, of course, a plan which will be feasible as well as fair and equitable." These standards of Third Avenue Transit do not relate to dismissal of a proceeding, but are the standards for issuance of trustee's certificates which would supersede existing mortgage liens. Of course, Third Avenue Transit has the further distinction that it was a Chapter X case rather than a section 77 proceeding.

It might very well be the case that a railroad does not have a likelihood of reorganization within a reasonable time, yet it would be ^{more/} in the public interest to continue the section 77 proceeding than to reorganize under Regional Rail Reorganization Act of 1973.

The various reorganization courts erred in holding, in essence, that inability to issue trustees certificates at the moment means that no "public interest" finding need be made as to whether the public interest would be better served by continuing the section 77 proceedings.

^{*/}See also: Separate opinion of Judge Fullam in Connecticut General (Civil No. 74-189) at p. 9. (6/25/74)

B. Statutory Language. The term "and" is used between the two portions of the first sentence of section 207(b). The presumption is for the conjunctive sense, unless the legislative intent is clearly to the contrary. Sutherland (4th Ed.), Section 21.14, fn. 2.

The public interest is paramount in railroad reorganizations. Accordingly, a balancing process would seem necessary between the two findings in the first sentence of section 207(b), with the two findings entered together and balanced against each other. We suggest that the two findings should be consistent. In a somewhat analogous situation, in proceedings under section 13a of the Interstate Commerce Act, 49 U.S.C. 13a, governing passenger train discontinuances, the "undue burden" and "public convenience and necessity" findings were balanced rather than entered separately. See: Illinois Commerce Commission v. United States, 320 F. Supp. 205, 208-9 (E.D. Ill. 1970); Southern R. Co. v. North Carolina, 376 U.S. 93, 101-5 (1964); Bard, Robert L., Rail Passenger Service, 34 U. of Chi. L. Rev. 301, 319-23 (1967). Cf. Public of State of Indiana v. United States, 325 F. Supp. 1223, 1226 (N.D. Ind. 1971).

C. Legislative Reports. The declaration of policy, 45 U.S.C. 701, shows concern for essential rail service in the midwest and northeast region of the United States. Section 101(a)(3) is an example:

"The public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers."

This type of "public interest" is a legislative power administered by Congress. The Supreme Court stated in a leading case involving a railroad in reorganization that such "public interest" has been entrusted to administrative agencies.

Palmer v. Massachusetts, 308 U.S. 79, 86 (1939):

"It has become the settled social policy of both the states and the nation to entrust the type of public interest here in question to expert administrative agencies because of "the notion" as Judge Learned Hand pointed out below, "that a judge is not qualified for such duties."

The cited quotation from Judge Learned Hand assumed constitutionality for the purposes of discussion. Converse v. Commonwealth of Mass., 101 F. 2d 48, 51 (2d Cir. 1939).

Such traditional and general "public interest" in railroad reorganizations limits the power of the judiciary. The Court stated in Flast v. Cohen, 392 U.S. 83, 97 (1968):

"Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."

The "public interest" here is a legislative matter, and is not thought of as being capable of resolution through the judicial process. It violates the separation-of-powers concept of the Constitution to thrust the legislative task of finding the overall "public interest" upon the court. National Ins. Co. v. Tidewater Co., 337 U.S. 582, 590-91 (1949).

The Penn Central reorganization court, in the Secondary Debtor opinion, recognized that Regional Rail Reorganization Act of 1973 fails to set forth standards by which the Court is to be guided in determining how the "public interest" will be better

served. (App., 31a):

"Stated otherwise, by placing the burden of proof upon those who argue for continuation of the section 77 proceedings, while simultaneously failing to provide any standard by which a court might adjudge that course to be preferable, Congress has effectively deprived the court of any power to decide in favor of the section 77 proceeding."

3. THE CONSTITUTIONALITY OF SECTION 207(b)
CANNOT BE SUSTAINED BY ELIMINATING THE
PUBLIC INTEREST FROM THE DECISIONAL PROCESS

The various reorganization courts which have found that the railroad is not reorganizable on an income basis within a reasonable time under section 77, have declined to make a public interest finding.^{11/} On the other hand, courts which have found in favor of reorganizability have also found that the public interest would be better served by continuing the section 77 proceedings.^{12/} The exception is the Penn Central Secondary Debtor proceedings, where the court ruled that Congress has effectively deprived the court of any power to decide in favor of the section 77 proceeding. (App., 29a-32a, 36a-39a).

We are aware of the rule that where a serious doubt of constitutionality exists, a construction which is fairly possible will be attempted so as to avoid the question. United States v. Delaware & H. Co., 213 U.S. 366 (1908); United States v. Congress of Industrial Organizations, 355 U.S. 106 (1948). However, as

^{11/} An exception is the reorganization court for Lehigh & Hudson River Railway Company (USDC-SDNY No. 72B 419), "the railroad cannot be reorganized on an income basis within a reasonable time and that the public interest requires reorganization under the Act."

^{12/} New Hope & Ivyland Railroad in this Circuit (USDC-EDPa. Bank. No. 70-324). Also Erie Lackawanna Ry. Co. (USDC-ND Ohio-ED No. B72-2838) and Boston & Maine Corp. (USDC-Mass No. 70-250-M).

a three-judge district court recently observed in declining to construe the Act so as to imply a Tucker Act remedy, there are limits on the ability of a court to construe a statute so contrary to its explicit terms. Connecticut General (Civil 74-189), at p. 48 (6/25/74):

"To accept the government defendants' contention would require judicial legislation on a grant, if not arrogant, scale."

The same conclusion is warranted with regard to the "public interest" requirement of the first sentence of section 207(b). Congress has the public interest as paramount. Here, the courts below would avoid determining the public interest to save the constitutionality of the section 207(b). The matter should be returned to the Congress for that body to either spell out the standards of the public interest or to assign the task to another agency.

The construction placed on section 207(b) by Judge Fullam in the Secondary Debtor proceedings is untenable. It would mean that the "120-day" proceedings were meaningless because of the conclusive presumption. There are other constitutional problems in connection with a conclusive presumption. Vlandis v. Kline, 412 U.S. 441 (1973).

CONCLUSION

The court should reverse and set aside the "120-day" orders of the reorganization courts for Penn Central, Lehigh Valley, Reading and Jersey Central.

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JUNE 1974

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In the Matter of THE CENTRAL RAILROAD COMPANY OF N.J. Debtor	:	No. 74-1686
COMMONWEALTH OF PENNSYLVANIA, Appellant	:	
In the Matter of PENN CENTRAL TRANSPORTATION COMPANY, Debtor	:	No. 74-1687
COMMONWEALTH OF PENNSYLVANIA, Appellant	:	
In the Matter of LEHIGH VALLEY RAILROAD COMPANY, Debtor	:	No. 74-1688
COMMONWEALTH OF PENNSYLVANIA, Appellant	:	
In the Matter of READING COMPANY, Debtor	:	No. 74-1689
COMMONWEALTH OF PENNSYLVANIA, Appellant	:	

BRIEF FOR APPELLANT
AND APPENDIX

Jurisdictional Statement

These appeals are taken pursuant to section 24 of the Bankruptcy Act, 11 U.S.C. 47. The subject-matter jurisdiction of the court is conferred by section 77 of the Bankruptcy Act, among other statutes. 11 U.S.C. 205

ISSUES PRESENTED

1. Whether the findings required to be made by the railroad reorganization court under section 207(b) are contrary to the separation of powers of the U.S. Constitution, so that the reorganization court lacks jurisdiction.
2. Whether the decision of the Special Court is binding as to the jurisdictional issues of this appeal.

STATEMENT

These are four appeals, taken by Commonwealth of Pennsylvania, from each of four decisions, entered on or about July 2, 1974, by four railroad reorganization courts situated within the Third Circuit. These four decisions are the so-called "180-day" decisions under section 207(b) of Regional Rail Reorganization Act of 1973, 45 U.S.C. 717(b).

The decision of the Reading court is reported at 378 F. Supp. 481, and is reproduced herein. (App., 1a-5a).

The decision of the Penn Central court is reported at 382 F. Supp. 856, and is reproduced herein. (App. 11a-26a). A related decision, involving the so-called "Secondary Debtors" of Penn Central, is reported at 382 F. Supp. 851, and is reproduced herein. (App., 6a-9a).

The decision of the Lehigh Valley court is reported at 382 F. Supp. 854, and is set forth herein. (App., 9a-11a)

The decision of the court for The Central Railroad Company of New Jersey is not reported. It is reproduced herein. (App. 27a-37a).

Related Appeals

These appeals, involving the "180-day" decisions by four courts under Regional Rail Reorganization Act of 1973, are related to four appeals taken from the so-called "120-day" decisions under the same Act. These are Nos. 74-1556, 74-1557, 74-1558 and 74-1589, which were argued July 18, 1974, together with a like appeal by the New Haven Trustee. (No. 74-1501).^{1/} However, the Clerk of Court advised on July 22 that this Court's decision was being postponed pending any guidance by the U.S. Supreme Court on various appeals taken from Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, 383 F. Supp. 510 (E.D. Pa. 1974).

The Supreme Court's decision was rendered December 16, 1974. Regional Rail Reorganization Act Cases, ___ U.S. ___, 43 Law Week 4031. Thereafter, the parties on January 14, 1975, whether and to what extent the Supreme Court's decision controls the appeals from the "120-day" decisions. It seems clear to us that the Supreme Court's decision has no bearing upon the appeals pending here.

Decision of the Special Court

Meanwhile, pending the Supreme Court proceedings, the Special Court^{2/} rendered lengthy opinions on September 30, 1974.^{3/}

^{1/} The New Haven Trustee has taken an appeal from the "180-day" determination in the Penn Central proceeding. No. 74-1649.

^{2/} Established under Section 209 of the Act, 45 U.S.C. 719.

^{3/} Friendly, P.J., McGowan and Thomsen, J.J. Each judge wrote a separate opinion.

As here pertinent, Judge Friendly ruled on the jurisdictional appeal taken by the New Haven Trustee from the Penn Central decision. (Sp.Ct., pp. 26-32). Although our appeals from the "120-day" orders had been dismissed earlier by the Special Court for lack of jurisdiction, In Re Penn Central Transportation Company, 382 F. Supp. 453 (Sp.Ct. 1974), and although we did not appeal the "180-day" decisions to the Special Court, except for Reading, Judge Thomsen nevertheless proceeded as if Pennsylvania had appealed certain constitutional issues to the Special Court. (Thomsen Op., pp. 1-4, 7-8, 12, 15).

We deem two matters of particular interest in the Special Court's opinions with respect to the instant appeals to this Court of Appeals. First, the phrase 'reorganizable on an income basis within a reasonable time under section 77', which appears in the first sentence of section 207(b), was held to be the equivalent of "undue delay" under section 77(g) of the Bankruptcy Act, a standard which would sometimes warrant dismissal. (Op. Thomsen, p. 4):

"Finally, we find no substantial difference between the standard used in section 207(b) -- 'reorganizable on an income basis within a reasonable time under section 77' -- and the standard -- 'undue delay' -- used in section 77(g)."

Second, the opinions of Judge Friendly and Judge Thomsen differed on the critical "public interest" standard thrust upon the various reorganization courts by section 207(b). Judge Friendly stated that except for the Penn Central Secondary Debtors, there was no occasion for the reorganization courts to consider whether reorganization under Section 77 of the

Bankruptcy Act would better serve the public interest. (Op. Friendly, p. 28) On the other hand, Judge Thomsen went further and made his own public interest finding, which was that the public interest would be better served by reorganization under the Act. (Op. Thomsen, pp. 3-4, 15).

ARGUMENT

The issues presented by these "180-day" appeals are similar to those raised in the pending "120-day" appeals.

Regional Rail Reorganization Act of 1973 is rapidly proving to have the disastrous consequences projected by Gov. Milton J. Shapp in his testimony in opposition before the U.S. Senate Committee which considered and approved the legislation. See: Hearings on S. 1031, S. 2188 & H.R. 9142, Northeastern and Midwestern Railroad Transportation Crisis, before Surface Transportation Subcommittee of the Committee on Commerce, U.S. Senate, 93rd Cong., 1st Sess., Ser. No. 93-8, at pp. 161-204 and 832-44 (1973).

We are lodging 4 copies of our amicus curiae brief to the U.S. Supreme Court in the Regional Rail Reorganization Cases, with the Clerk of Court. Our brief filed in the appeals from the "120-day" decisions is incorporated herein by reference.

THE SPECIAL COURT'S DECISION DOES NOT DECIDE THE APPEALS

The opinions of the Special Court do not decide these appeals. The jurisdiction of the reorganization court is reviewable by this Court of Appeals.

This issue was briefed by the New Haven Trustee in conjunction with the "120-day" decisions. The subsequent actual decision of

the Special Court does not alter the scope of review in this Court of Appeals. Moreover, Commonwealth of Pennsylvania did not attack the jurisdiction of the reorganization court in the Special Court. Indeed, we were appellees in the Special Court, in favor of the result below in all cases except the Reading case, and our appeals in the "120-day" decisions had been rejected by the Special Court for lack of jurisdiction by the Special Court. In Re Penn Central Transportation Company, 382 F. Supp. 453 (Sp.Ct. 1974).

We strongly disagree with the jurisdictional views of the Special Court.

Moreover, because section 207(b) purports to cut-off review of the Special Court's decision by the U.S. Supreme Court, in the view of some, it would seem preferable to have any review of the jurisdictional contentions reach the Supreme Court by way of the Third Circuit rather than by way of the Special Court. The Special Court in its September 30, 1974, decision deferred to review by way of appeal from a three-judge district court decision to the U.S. Supreme Court on certain issues, so that there is no reason to at this time assume a different course here.

CONCLUSION

The court should reverse and set aside the "180-day" decisions of the reorganization courts for Penn Central, Lehigh Valley, Reading and Jersey Central.

Respectfully submitted,

ROBERT P. KANE, Attorney General
Capitol Annex
Harrisburg, Pa. 17120

MICHAEL von MOSCHZISKER, Deputy Atty. Gen.
206 State Office Building
Philadelphia, Pa. 19130

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705 Ring Building
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JANUARY 1975

Attorneys for Commonwealth of Pennsylvania

DOCKET ENTRIES

<u>Date</u>	<u>Paper No.</u>	<u>Description</u>
1/23/74	128	Filed Order No. 33 and petition under Sec207(b) of Regional Rail Reorganization Act. of 1973. JUDGE WARD, DATED: 1/22/74.
3/6/74	130	Filed Statement of the Attorney General of the State of New York in regard to whether the debtor railroad should be reorganized under its present plan of reorganization or be reorganized under the Regional Rail Reorganization Act of 1973., affidavit of service annexed, sworn to:3/1/74.
3/18/74	132	Filed Response to Order No. 33(re Paper No. 128)re; Legal and Factual issues, which will be pursued at 4/1/74 hearing etc.sub. by: ISRAEL PACKEL, Attorney General, Harrisburg, Pa and GORDON P. MacDOUGALL, Spec.Asst.Atty.Gen.Washington, D.C. Atty's for Commonwealth of Penna. COPY TO JUDGE WARD.
3/18/74	133	Filed Affidavit on Behalf of JOHN F. NASH and ROBERT C. HALDEMAN, trustees of the property of Lehigh Railroad Company debtor re: Regional Rail Reorganization Act. of 1973. sworn to:3/15/74. COPY TO JUDGE WARD.
3/19/74	134	Filed Brief of George P. Baker, Richard C. Bond and Jervis Langdon, Jr. trustees of the property of Penn Central Transportation Company, debtor with respect to hearing scheduled for April 1, 1974, concerning section 207(b) of the Regional Rail Reorganization Act of 1973. Dated:3/18/74. COPY TO JUDGE WARD.
3/21/74	135	Filed BRIEF on State of New Jersey-sub. by: William F. Hyland Attorney General of New Jersey. Dated: 3/18/74 COPY TO JUDGE WARD. (pursuant to ORDER NO. 33)
3/21/74	137	Filed Memorandum of the U.S. of A. on "120-Day" issues under Section 207 of the Regional Rail reorganization Act. of 1973. by: Irving Jaffe, Acting Asst.Atty.Gen., Paul J. Curran U.S. Atty. David J. Anderson, Special Litigation Counsel and James F. Dausch, Atty.U.S.Dept. of Justice, Washington, D.C. COPY TO JUDGE WARD.
3/29/74	142	Filed Affidavit of W.G. Moore with exhibits for hearing under Section 207(b) Regional Rail Reorganization Act. of 1973. sworn to: 3/26/74.COPY f.
3/29/74	143	Filed Affid. of John G. Troiano, trustee of the property of the Lehigh and Hudson River Railway

Co. in connection with hearing pursuant to Regional Rail Reorganization Act. of 1973. sworn to: 3/26/74. COPY f.

- 3/29/74 144 Filed Brief of John G. Troiano, trustee of the property of the Lehigh and Hudson River Railway Co. debtor, with respect to hearing for April 1, 1974 concerning Section 207(b) of the Regional Rail Reorganization Act of 1973. COPY f.
- 4/1/74 145 Filed Affidavit of E.L. TENNYSON, deputy Sec. of the Penna. Dept. of Transportation etc. sworn to: 3/29/74.
- 4/17/74 149 Filed Reply Brief of George P. Baker, Robert W. Blanchette and Richard C. Bond, trustees of the property of Penn Central Transportation Company, Debtor, in connection with section 207(b) of the Regional Rail Reorganization Act of 1973., sub. by: James W. Howard, Atty. for George P. Baker, etc. Dated: 4/16/74. (f)
- 4/17/74 150 Filed Reply Brief of trustee, sub. by: Timothy V. Smith, attorney for John G. Troiano, trustee, etc. Dated: 4/16/74.f.
- 4/24/74 150-A Filed Opinion No. 40634 re: Class 11 railroad presently in reorganizationFor the reasons stated, Court finds that the railroad cannot be reorganized on an income basis within a reasonable time and that the public interest requires reorganization under the Act. the foregoing constitutes the initial finding of this Court pursuant to section 207(b) of the Regional Rail Reorganization Act. of 1973. It is so ordered. JUDGE WARD, DATED: 4/24/74. SEE OPINION FOR FULL DETAILS.
- 4/24/74 151 Filed Brief sub. by: Israel Packel, atty. General, Harrisburg, Pa. et al - attorneys for Commonwealth of Penna. Dated: 4/8/74.
- 5/6/74 153 Filed NOTICE OF APPEAL of the Commonwealth of Penna. to the Special Court under Sec. 209 of the Regional Rail Reorganization Act. of 1973 from an order of this Court dated 4/24/74 finding that the Railroad cannot be reorganized on an income basis, etc. by: Arthur A. Arsham, Attorney for Appellant. Dated: 5/6/74. (Certificate of Service to all other counsel by: Gordon P. MacDougall, Counsel for Appellant)
- 5/22/74 160 Filed Order No. 38 in connection with the determination to be made by the Court on or before July 1, 1974, pursuant to the second sentence of Section 207(b) of the Regional Rail Reorganization Act of 1973 as to whether or not

such railroad shall be reorganized by means of transferring some or all of its rail properties to the Consolidated Rail Corp and whether or not the aforesaid act provides a process which would be fair and equitable to the estate of the railroad in reorganization, etc. signed by: JUDGE WARD, DATED: 5/22/74. COPY TO JUDGE WARD.

5/31/74

161

Filed STATEMENT of position and Brief of Trustees of the property of Penn Central Transportation Company Debtor, pursuant to Order No. 38., sub. by: JAMES E. HOWARD, attorney for trustees (George P. Baker, Robert W. Blanchette and Richard C. Bond of the property of Penn Central Transportation Co, etc.) COPY TO J. WARD.

6/3/74

162

Filed BRIEF of State of New Jersey)pursuant to paragraph three of Order No. 38)...the State of N.J. requests that the Court make a finding that the Act provides a process which is fair and equitable to the estate of L&HR and direct the L&HR to reorganize pursuant to the Act. sub. by: William F. Hyland, Attorney General of N.J. COPY TO JUDGE WARD.

6/4/74

163

Filed BRIEF of Railway Labor Executives' Assn. in support of reorganization of debtor in accordance with provisions of the Regional Rail Reorganization Act. of 1973. sub. by: Edward J. Hickey, Jr., William J. Hickey, and Geoffrey N. Zeh of the firm Mulholland, Hickey and Lyman, 1125 15th St N.W. Suite 400, Washington, D.C. 20005. COPY TO JUDGE WARD.

6/4/74

164

Filed STATEMENT of position and brief of the United States of America and United States Railway Association, pursuant to Order No. 38, relating to "180-Day" proceedings under Section 207(b) of Regional Rail Reorganization Act of 1973, sub. by: C. Hills, Asst. Atty.Gen. Paul J. Curran, U.S. Atty. David J. Anderson, Special Lit. Counsel - James F. Dausch, Atty. U.S. Dept. of Justice, Washington; D.C. 20530 - Jerome E. Sharfman, Atty. U.S. Dept. of Transportation, Washington, D.C. 20590, et al - Dated: 6/4/74 - f.

6/4/74

165

Filed AFFIDAVIT of JOHN W. INGRAM the Adm. of Federal RR Adm. etc. affidavit submitted for the purpose of demonstrating that the Regional Rail Reorganization Act. of 1973 etc. provides financial and legal resources, whereby a financially self-sustaining rail system can be created around the rail system currently operated by railroads in reorganization in the Midwest and Northeast region, etc...District of Columbia City of Washington sworn to: 5/30/74.

6/4/74	166	Filed INCORPORATION OF BRIEF BY REFERENCE (Brief of defendant in opposition to Plaintiffs' motion for summary judgment and in partial opposition to intervening defendants' motion for summary judgment) sub. by: C. Hills, asst. Atty. Gen. Paul J. Curran, US Atty. D. Dandrson, Special Lit. Counsel et al...Dated: 6/4/74.
6/5/74		Filed BRIEF of JOHN G. TROIANO, trustee of the property of the Lehigh and Hudson River Railway Co. Debtor by TIMOTHY V. SMITH, ATTY.
6/5/74	167	Filed NOTICE OF MOTION of the United States Railway Association for leave to intervene for limited purpose of participating in "180-DAY proceeding", sub. by: Paul J. Curran, U.S. Atty. Joseph P. Marro, Asst. U.S. Atty et al.
6/5/74	168	Filed MEMORANDUM in support of motion to intervene by the United States Railway Association, sub. by: Paul J. Curran, U.S. Attorney by: Joseph P. Marro, Asst U.S. Atty. et al.
6/6/74	169	Filed INCORPORATION of brief by Reference (Brief of the U.S.A. and United States Railway Association pursuant to Order No. 662, relating to "180-Day" proceedings pursuant to Section 207(b) of Regional Rail Reorganization Act. of 1973., sub. by: Carla A. Hills, Atty. Atty. Gen., Paul J. Curran, US Atty., David J. Anderson, Special Lit. Counsel - James F. Dausch, Atty. US Dept. of Justice, Washington, D.C. 20530 - Jerome E. Sharfman, Atty. US Dept. of Transportation, Washington, D.C. 20590. COPY TO JUDGE WARD. f.
6/7/74	170	Filed ORDER granting motion of the US Railway Asso for leave to intervene and that same is admitted as party for the limited purpose of participating in the proceedings etc. JUDGE WARD, DATED: 6/6/74.
6/14/74	172	Filed POST-HEARING Brief of the USA and the US Railway Association in the "180-Day" proceedings under section 207(b) of the Regional Rail Reorganization Act of 1973, sub. by: Rodney E. Eyster, Gen. Counsel U.S. Dept. of Transportation, etc. f.
6/14/74	173	Filed COPY OF PT. 1-Statement of Position and Brief of the U.S.A. and the U.S. Eailway Association, dated: 6/6/74, in the PENN CENTRAL "180-Day" proceeding. f
6/18/74	174	Filed POST-HEARING Memorandum of trustees of the property of Penn Central Transportation Company, Debtor in connection with "180 Day" Decision under Section 207(b) of Regional Rail Reorganization Act of 1973 (sub. on behalf of George P. Baker, Robert W. Blanchette and Richard C. Bond, trustees of the property of Penn Central Transportation Co. etc.)

sub. by: James E. Howard, Attorney for Trustees
of the property of Penn Central Transportation
Co., Debtor, dated: 6/17/74. f.

7/1/74

175

Filed OPINION NO. 40910 re: question as to whether
the Act provides a process which is fair and
equitable to the estate of the railroad...Court
determines that the Act does not provide a process
of reorganization which is fair and equitable
to the estate of the railroad. Unless and until
the decision of the three-judge court and the
resulting order dated: 6/25/74 etc., In the interim,
the trustee is directed to look to the Sec. of
Transportation for such assistance as is necessary
for the continued provision of essential services
by the railroad. JUDGE WARD, Dated: 7/1/74
(SEE OPINION FOR FULL DETAILS)

7/25/74

195

Filed transcript dated 6-6-74.

8/1/74

196

Filed transcript dated 4-1-74.

7/9/73

73

Petition for Order fixing date for cessation.

7/27/74

108-A

Exhibits Nos. 1 through 17, identified and
received during hearings on July 26-27, 1973

Transcript of hearings of July 26-27, 1973.

4/1/74

Exhibits of Commonwealth of Pennsylvania, No. 1
Oral Statement of W.G. Moore, dated 3-4-74
No. 2, Advice concerning duration of Reorganizat-
ion of Class I Railroads under Section 77 of
Bankruptcy Act.

Statement of Jones Chemicals, Inc., dated March
28, 1974.



In the Matter of **LEHIGH AND HUDSON
RIVER RAILWAY COMPANY,**
Debtor.

No. 72 B 419.

United States District Court,
S. D. New York.

April 24, 1974.

Railroad reorganization proceeding. The District Court, Robert J. Ward, J., held that Regional Rail Reorganization Act of 1973 applies to class II railroads, that a reasonable time for reorganization outside the Act must be at least approximately as rapid as time schedule of the Act, that future state subsidies were not the "income basis" for reorganization referred to in the Act, that railroad could not be reorganized on an income basis within a reasonable time and that the public interest required reorganization under the Act.

Order accordingly.

1. Bankruptcy \hookrightarrow 802

Regional Rail Reorganization Act of 1973 applies to class II railroads. Regional Rail Reorganization Act of 1973, § 207(b), 45 U.S.C.A. § 717(b).

2. Bankruptcy \Rightarrow 803

A "reasonable time" within meaning or provision of Regional Rail Reorganization Act requiring a court to determine whether a railroad is reorganizable on an income basis within a reasonable time under Bankruptcy Act and that the public interest would be better served by continuing the reorganization under the Bankruptcy Act must be at least approximately as rapid as the time schedule of the Reorganization Act. Bankr. Act, § 77, 11 U.S.C.A. § 205; Regional Rail Reorganization Act of 1973, § 207(b), 45 U.S.C.A. § 717(b).

See publication Words and Phrases for other judicial constructions and definitions.

3. Bankruptcy \Rightarrow 803

Future state subsidies, even if the enabling legislation is enacted, are not the "income basis" for reorganization referred to in the Regional Rail Reorganization Act. Regional Rail Reorganization Act of 1973, § 207(b), 45 U.S.C.A. § 717(b).

See publication Words and Phrases for other judicial constructions and definitions.

4. Bankruptcy \Rightarrow 803

Record established that the Lehigh and Hudson River Railway Company, which was in reorganization proceedings under Bankruptcy Act, could not be reorganized on an income basis within a reasonable time and that the public interest required reorganization under the Regional Rail Reorganization Act, notwithstanding possibility of additional revenue from rerouting of traffic by another carrier undergoing reorganization, proposal by instant carrier and another to create a new rail corporation and possible state subsidy. Bankr. Act, § 77, 11 U.S.C.A. § 205; Regional Rail Reorganization Act of 1973, § 207(b), 45 U.S.C.A. § 717(b).

John G. Troiano, New York City, trustee, Timothy V. Smith, New York City, N. Y., for trustee.

James F. Dausch, Dept. of Justice, for the U. S.

James E. Howard, Philadelphia, Pa., for the trustees of the Penn Cent. Transp. Co.

Richard D. Lalanne, New York City, for the trustees of the Lehigh Valley Railroad Co.

Michael D. McDonald, Albany, N. Y., for the State of N. Y.

Kenneth S. Levy, Deputy Atty. Gen., for the State of N. J.

Gordon P. MacDougall, Washington, D. C., for the Commonwealth of Pa.

ROBERT J. WARD, District Judge.

The Lehigh and Hudson River Railway ("the railroad") is a Class II railroad* presently in reorganization within the jurisdiction of this Court under Section 77 of the Bankruptcy Act (11 U.S.C. § 205). Section 207(b) of the Regional Rail Reorganization Act of 1973 (Pub.L. 93-236, Jan. 2, 1974, hereinafter referred to as "the Act") requires this Court to determine, before May 2, 1974

"whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. § 205) and that [sic] the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act."

If this initial question is decided in the negative, the Court is required before July 1, 1974 to order that reorganization be proceeded with under the Act, unless it at that time finds that the Act does not provide a process which would be fair and equitable to the estate of the railroad, in which case it must dismiss the reorganization proceedings. At the present time only the initial question is before this Court.

A hearing was held on April 1, 1974 upon notice to all parties and all creditors of the railroad, to supplement the information already before the Court as a result of its extensive examination of

* A Class II railroad is one with annual revenue of less than \$5 million.

the financial condition of the railroad in July and October of 1973. In July, the Court considered whether the railroad's desperate lack of cash and the absence of any potential resources, public or private, justified its ceasing to operate; in October, the Court authorized the pledge of four locomotives as security for an emergency loan to enable the railroad to continue operating. The Court viewed both ceasing operations and further encumbering the property of the railroad as extraordinary measures, warranted only by extreme financial necessity unrelieved by already stringent budgeting. The evidence introduced at those two hearings over a total of three days amply demonstrated that the railroad derives insufficient income from its operations to sustain itself, that all avenues for increasing revenue or decreasing expenses had been explored and were presently unavailable, that local industry depends upon the railroad, that the railroad is an important link in a wider network of rail transportation, and that neither the governments of the affected states nor the federal government were prepared to subsidize the operation of the railroad, although all agreed upon the importance of its continued operation. At the time of those hearings it appeared to all that the survival of the railroad depended upon the imminent passage of comprehensive federal legislation which would include provisions for financial assistance. The question now before the Court is whether intervening circumstances have so changed the position of the railroad that it is advisable to refuse the assistance offered by the Act and attempt to reorganize independently.

The Commonwealth of Pennsylvania ("Pennsylvania") alone opposes the railroad's participation in reorganization under the Act. Its first objection is jurisdictional. It contends that the Act's mandate that the Court determine the public interest in ruling on the question now before it is an unconstitutional delegation of a legislative function to a judicial body and that therefore the Court is without jurisdiction to decide this

question. Since this argument is being raised in other forums and an appeal is contemplated, the parties have stipulated that it not be argued or decided here, without prejudice to its being raised at a later time. Without deciding the question, the Court simply notes that in its capacity as overseer of the reorganization of this railroad under Section 77 of the Bankruptcy Act it has frequently and necessarily considered the interest of the public, most recently in the July and October hearings discussed above.

Also as a jurisdictional matter, Pennsylvania contends that the Act was not intended to apply to Class II railroads, since they were not specifically itemized in its provisions nor included with discussions of Class I railroads in reorganization in the House committee report.

[1] It is clear to this Court that the Act is intended to apply to Class II railroads. The Act makes no distinction between Class I and Class II railroads and, indeed, for its purposes, there is no real distinction to be made. The only difference between the two is the dollar amount of annual revenue, and railroads of both classes are now in equally desperate straits. The Senate committee report itself refers to Class II railroads as part of the crisis situation the Act is designed to correct. S.Rep. No.93-301. 93d Cong. 1st Sess. (1973). The Department of Transportation in the first two sentences of its mandated "30 day report" explicitly mentioned this railroad:

"LEGISLATIVE MANDATE

Much of the railroad system in the region comprising the Northeast and portions of the Midwest has fallen into serious physical disrepair and financial insolvency.¹ Seven of the region's Class I and one of its Class II railroads are undergoing reorganization under section 77 of the Bankruptcy Act, and some are close to liquidation.² (The footnotes define the region and Class I and Class II railroads and name those railroads which

IN RE LEHIGH AND HUDSON RIVER RAILWAY COMPANY

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Cite as 374 F.Supp. 4 (1974)

are in reorganization.) U. S. Dep't of Transportation, Rail Service in the Midwest and Northeast Region, at 1 (Feb. 1, 1974). (Hereinafter referred to as "the Report.")

The Department of Transportation has made a statement, incorporated into the record of this proceeding on April 1, 1974, indicating that it will recommend to the United States Railway Association that the railroad be given due consideration as an alternate route to New England in the final system plan, and that it has as yet made no analysis of whether the railroad's lines are "potentially excess." While this statement is ambiguous concerning the final form in which the railroad may be incorporated into a final system plan, the Department of Transportation clearly understands the Act to apply to this Class II railroad.

In sum, this railroad is a part of the problem, of crisis proportions, affecting rail transportation in the northeast and was specifically mentioned in both the Senate Report on the proposed Act and the Department of Transportation Report made pursuant to the Act. It was not specifically excluded from the provisions of the Act. The Department of Transportation intends to recommend its consideration as part of the final system plan. In the absence of a clear legislative indication to the contrary, this Court considers the railroad within the scope of the Act's provisions.

In addition to its jurisdictional contentions, Pennsylvania argues that the railroad is reorganizable on an income basis, and that the public interest would best be served by its reorganization outside the Act. It makes these arguments in the face of a strong presumption, expressly stated in Section 207(b) of the Act, that railroads in reorganization in the region should come under the Act, and in the face of overwhelming evidence earlier presented concerning the desperate financial situation of the railroad. The arguments it advances are unpersuasive.

[2] It first attempts to define the Section 207(b) term "reasonable time" for reorganization outside the Act. It presents a table indicating the various lengths of time that railroads have been in reorganization proceedings in the past forty years. The range is from three years to as long as twenty-two years, with the great majority between eight and sixteen years. By contrast, of course, the present reorganization proceeding is of relatively short duration. Pennsylvania attempts from this data to conclude that even somewhat remote possibilities of successful income based reorganization can be considered reasonable and justify reorganization outside the Act. In so doing it ignores the fact that this railroad recently has been and soon may be again on the verge of liquidation, that it has insufficient funds to operate, and that the timetable of the Act in response to a situation deemed critical is rather more accelerated than what might in the past have been considered a reasonable time for reorganization. Indeed, the very evidence Pennsylvania puts forth highlights the problem which the Act is designed to remedy. In the judgment of this Court, a "reasonable time" for reorganization outside the Act must be at least approximately as rapid as the time schedule of the Act. None of the present possibilities can realistically be said to fall within this time frame.

The Trustee of the railroad has recently filed a petition as a creditor in the reorganization proceeding of the Penn Central Transportation Company ("Penn Central"), requesting that the latter be directed to route traffic over the Lehigh and Hudson River line, in a traffic pattern followed until the New Haven Railroad's inclusion into Penn Central. The railroad maintains that this would be economical for Penn Central since it would provide a shorter route for certain traffic than that presently followed; it would also provide sufficient additional revenue to the railroad to permit it to operate profitably.

The latter effect would indirectly benefit the Penn Central estate since Penn Central is in turn both a creditor and shareholder of the railroad. No hearing has yet been held on this petition and the outcome is at best uncertain. The Penn Central, itself in reorganization under Section 77 of the Bankruptcy Act, is eligible for inclusion under the provisions of this Act. Even were the present reorganization Court to order a particular traffic flow, that determination would be subject to change, especially in the context of a new final system plan under the Act. Thus, this source of additional revenue for the railroad, while a possibility which merits serious exploration and full consideration, does not in itself provide sufficient ground for an affirmative finding that the railroad is reorganizable on an income basis within a reasonable time.

The second distant glimmer upon which Pennsylvania would have this Court rely is the proposal recently proffered by the Lehigh Valley Railroad Company and Reading Railroad Company, to create a Mid-Atlantic Rail Corporation ("MARC") of which this railroad's line would be a contributing part. MARC's chief proponents acknowledge that its realization will require massive funding and some time, and indeed now look to the Act as the source of funding. Such a speculative possibility cannot serve as the basis for a decision to reorganize outside the Act.

[3] Thirdly, Pennsylvania points to legislation recently introduced in New Jersey which, if passed, would provide a subsidy to the railroad. (Pennsylvania itself, with only one mile of the railroad within its borders, is unwilling to provide it meaningful financial assistance.) In the judgment of this Court future state subsidies, even if the enabling legislation is enacted, are not the "income

basis" for reorganization referred to in the Act.

The thrust of Pennsylvania's arguments appears to be that the railroad should be kept alive independently because the competition that it would provide is essential to healthy rail service in the region. It points out that the Act provides no guarantee that this route would be continued, yet itself mandates competition among healthy carriers. If such a course were realistically possible the Court would be inclined to agree. This is not, however, a healthy carrier, but one desperately in need of resuscitation. Moreover, the Secretary of Transportation in his initial report considered the Mid-Atlantic to New England route insufficiently traveled to support competitive carriers. (See, Report, *supra*, pp. 25-36.)

This Court considers the question whether, in the overall scheme of a final system plan, the Lehigh and Hudson River route should be maintained as part of a competitive line, as part of the Consolidated Rail Corporation, or not at all, to be beyond the scope of the present inquiry. However, it is clear that the interest of those directly affected as owners, creditors, or consumers of its services requires that the railroad be kept alive in some form, and that it cannot survive on its own. It is equally clear that the interim cash assistance offered under the Act is the only actual resource available.

[4] For the reasons stated, this Court finds that the railroad cannot be reorganized on an income basis within a reasonable time and that the public interest requires reorganization under the Act. The foregoing constitutes the initial finding of this Court pursuant to Section 207(b) of the Regional Rail Reorganization Act of 1973.

It is so ordered.

Cite as 377 F.Supp. 475 (1974)

John G. Troiano, Timothy V. Smith,
New York City, for Trustee.

Jerome E. Sharfman, Dept. of Trans.,
Washington, D. C., for the United States
of America.

Wilmer, Cutler & Pickering, Washing-
ton, D. C., for the United States Railway
Association; William T. Lake, Washing-
ton, D. C. of counsel.

Michael D. McDonald, Albany, N. Y.,
for the State of New York.

Kenneth S. Levy, Deputy Atty. Gen.,
for the State of New Jersey.

Geoffrey N. Zeh, Washington, D. C.,
for the Railway Labor Executives Asso-
ciation.

James E. Howard, Philadelphia, Pa.,
for the Trustees of the Penn. Cent.
Transp. Co.

Gordon P. MacDougall, Washington,
D. C., for the Commonwealth of Pa.,

Richard B. Wachenfeld, Jersey City,
N. J., for the Cent. Railroad of N. J.



In the Matter of The LEHIGH AND HUD-
SON RIVER RAILWAY COMPANY,
Debtor.

No. 72-B-419.

United States District Court,
S. D. New York.

July 1, 1974.

Proceedings under Regional Rail
Reorganization Act of 1973. The Dis-
trict Court, Robert J. Ward, J., held that
the Act does not provide a process which
is fair and equitable to the estate of the
railroad.

Order accordingly.

Railroads \Leftrightarrow 30

Regional Rail Reorganization Act of
1973 does not provide a process of reor-
ganization which is fair and equitable to
the estate of a railroad undergoing
reorganization pursuant to Bankruptcy
Act, in that it precludes a form of liqui-
dation under the Bankruptcy Act.
Bankr. Act, § 77, 11 U.S.C.A. § 205; Re-
gional Rail Reorganization Act of 1973,
§ 207(b), 45 U.S.C.A. § 717(b).

OPINION

ROBERT J. WARD, District Judge.

The Lehigh and Hudson River Rail-
way Company ("the railroad") is pres-
ently in reorganization proceedings be-
fore this Court pursuant to § 77 of
the Bankruptcy Act, 11 U.S.C. § 205
("§ 77"). On April 24, 1974, 374 F.
Supp. 4, the Court determined, as re-
quired by § 207(b) of the Regional Rail
Reorganization Act of 1973, Pub.L. 93-
236, 45 U.S.C. §§ 743-744 ("the Act")
that the railroad is not independently re-
organizable on an income basis under §
77 within a reasonable time, and that the
public interest would be served by per-
mitting it to participate under the Act.

The question now before this Court is
whether the Act provides a process
which is fair and equitable to the estate
of the railroad. If the Act does not pro-
vide such a process, the Court is re-
quired by § 207(b) to dismiss the reor-
ganization proceeding. If the Act does
provide such a process, the Court must
order that the railroad proceed with
reorganization pursuant to its provi-
sions, by transferring at least some of

its rail properties to the Consolidated Rail Corporation ("Conrail"). The assets to be transferred will be those chosen for inclusion in the final system plan. Under the Act, assets not so chosen may be sold or the States may subsidize those services they deem essential.

A hearing was held June 6, 1974, after notice to all parties in the § 77 proceeding and to all creditors of the railroad. The Penn Central Transportation Company ("Penn Central"), the Central Railroad of New Jersey ("CNJ"), and the Commonwealth of Pennsylvania, owners and creditors of the railroad, opposed inclusion as provided by the Act. The Trustee of the railroad, the United States of America, the United States Railway Association ("the Association"), and the States of New York, New Jersey and Connecticut supported the railroad's participation under the Act.

Subsequent to the hearing, a three-judge court sitting in the Eastern Dis-

trict of Pennsylvania held that §§ 304(f) and 303 of the Act are unconstitutional; and that because the effect of Section 207(b) precludes a form of liquidation under Section 77 of the Bankruptcy Act, it is constitutionally defective.

For the reasons set forth in that decision, which are equally applicable to this railroad, this Court determines that the Act does not provide a process of reorganization which is fair and equitable to the estate of the railroad. Unless and until the decision of the three-judge court and the resulting order dated June 25, 1974¹ are reversed and vacated, this Court retains jurisdiction over the proceedings for reorganization under § 77.

In the interim, the Trustee is directed to apply to the Secretary of Transportation for such assistance as is necessary for the continued provision of essential services by the railroad.

It is so ordered.

1. The order provides:

1. That the defendant, United States Railway Association, is enjoined from certifying a Final System Plan to the Special Court pursuant to Section 209(c) of the Regional Rail Reorganization Act of 1973.

2. That the defendants are enjoined from taking any action to enforce the provisions of Section 304(f) of the Regional Rail Reorganization Act of 1973, with respect to any abandonment, cessation, or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution.

3. That all parties are enjoined from enforcing, or taking any action to implement, so much of Section 207(b) of the Regional Rail Reorganization Act of 1973 as purports to require dismissal of pending proceedings for reorganization under Section 77 of the Bankruptcy Act.

4. That a declaratory judgment be entered, declaring:

a. That Section 303 of the Regional Rail Reorganization Act of 1973 is null and void as contravening the Fifth Amendment of the United States Constitution insofar as it fails to provide compensation for interim erosion

pending final implementation of the Final System Plan pursuant to the statute.

b. That Section 304(f) of the Regional Rail Reorganization Act of 1973 is null and void as violative of the Fifth Amendment of the United States Constitution, to the extent that it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad.

c. That so much of Section 207(b) of the Regional Rail Reorganization Act of 1973 as requires reorganization courts to dismiss pending proceedings under Section 77 of the Bankruptcy Act under the circumstances set forth in said Section 207(b) is null and void, as violative of Article I, Section 8, Clause 4 of the Constitution of the United States.

5. That the respective motions of the plaintiffs for partial summary judgment are granted in part, as set forth above, and in all other respects are denied.

6. That the defendants' motions for summary judgment are denied.

Connecticut General Insurance Corporation, et al. v. United States Railway Association, et al., D.C., — F.Supp. —; Smith v. United States of America, et al., Civil Action No. 74-1107; Penn Central Company v. Brinegar, et al., Civil Action No. 74-1149 (E.D. Pa. June 25, 1974).

No. 74-1684 & No. 74-2018

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

In the Matter of
THE LEHIGH and HUDSON RIVER RAILWAY
COMPANY,

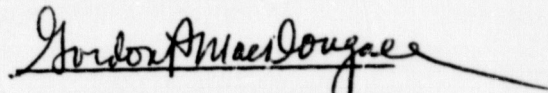
Debtor

COMMONWEALTH OF PENNSYLVANIA,

Appellant

CERTIFICATE OF SERVICE

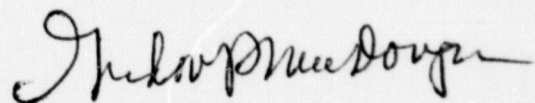
I hereby certify that I have this 27th day of January, 1975, served two copies of BRIEF AND APPENDIX upon all parties, as shown in the attached list, by first class mail postage prepaid.


GORDON P. MacDOUGALL

Washington, D.C.

I hereby certify that I have this 10th day of
February, 1975, served ^{TWO} copies of corrected "~~Declaratory~~ Entries"
on all parties, as shown in attached list by first class
mail postage prepaid

Washington DC



In re Lehigh & Hudson River Railway Co. Bky. No. 72-419

Appendix B

~~COUNSEL FOR PARTIES (OTHER THAN FEDERAL GOVERNMENT PARTIES)
WHO APPEARED IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
WITH RESPECT TO THE COURT'S ORDER OF JULY 1, 1974
UNDER SECTION 207(b) OF THE
REGIONAL RAIL REORGANIZATION ACT OF 1973~~

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February 10, 1975

Re: In Re Lehigh & Hudson River Ry. Co.
Appeal of Commonwealth of Pennsylvania
Nos. 74-1684 and 74-2018 (USCA-2d Cir.)

TO ALL COUNSEL OF RECORD:

Enclosed are two copies of a five-page document entitled, "Docket Entries", which should be inserted immediately behind the pink page in each of the two briefs previously mailed to you.

The court's copies are being corrected.

I regret this inconvenience.

GORDON P. MacDOUGALL
Spec. Asst. Atty. Gen.
Commonwealth of Pa.

